

APPEAL NO. 030036
FILED FEBRUARY 18, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 2, 2002. With respect to the disputed issues before her, the hearing officer determined that: (1) the appellant (claimant) did not sustain a compensable injury on _____; (2) the respondent (carrier) is relieved from liability under Section 409.002 because the claimant did not timely notify his employer of his alleged injury pursuant to Section 409.001; (3) the alleged compensable injury is not a producing cause of the lumbar injury after June 17, 2002; and (4) the claimant did not have disability resulting from his alleged _____, injury. The claimant appeals the determinations on sufficiency of the evidence grounds, and argues that his counsel was ineffective. The carrier responds, urging affirmance.

DECISION

Affirmed.

We first address the fact that the claimant has attached various documents to his appeal, a few of which are contained in the hearing record. However, some documents, including correspondence from the claimant's former attorney dated December 19, 2002, are offered for the first time on appeal. In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we generally only consider evidence that was submitted into the record at the hearing. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this instance, the December 19, 2002, correspondence is the claimant's former attorney's letter of withdrawal and was not created until after the CCH. We will consider the document as notification that the claimant is no longer represented by counsel, although we note that the letter reads that the claimant's date of injury is "02/06/02."

Next, we address the claimant's argument that his attorney was ineffective as counsel at the CCH. The claimant had numerous opportunities to object to his attorney's handling of his case at the CCH and did not do so. In addition, the Appeals Panel does not address the matter of the efficacy of the claimant's representation at the CCH. The claimant also alleges that his counsel erred in relying upon what counsel called a "gentlemen's agreement" between he and the carrier's counsel with respect to not objecting to the admission of documents that were not timely exchanged. Included with the excluded documents was a letter from the Occupation Safety and Health

Administration (OSHA), which the claimant attaches to his appeal. The claimant's allegation may be correct, and the documents were excluded, but the hearing officer based her exclusion of the documents upon guiding principles and thus did not abuse her discretion. See, *generally*, Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We will not consider the OSHA letter for any purposes for the first time on appeal when it was appropriately excluded at the CCH.

The hearing officer did not err in determining that the claimant did not sustain a compensable injury on _____. Under the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer noted that the claimant's account of the alleged incident was inconsistent with the other evidence and that the claimant kept working and did not seek medical attention for more than nine months. The hearing officer determined that the claimant did not sustain his burden of proving that he sustained a compensable injury. The hearing officer was acting within her province as the fact finder in resolving the conflicting evidence against the claimant and nothing in our review of the record demonstrates that the hearing officer's determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In addition, the hearing officer did not err in determining that the carrier was relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer of his alleged injury pursuant to Section 409.001. The record supports the hearing officer's finding that the claimant did not report his alleged injury to his employer until June 18, 2002, more than nine months after his alleged date of injury. Accordingly, no sound basis exists for us to reverse the hearing officer's determination in that regard. Cain, *supra*.

Nor did the hearing officer err in determining that the claimant's alleged _____, injury is not a producing cause of the alleged lumbar injury after June 17, 2002. As written above, the hearing officer concluded that the claimant sustained no compensable injury on _____. Consequently, the hearing officer also determined that whatever lumbar injury the claimant may have after June 17, 2002, it was not caused by or related to any claimed injury of _____. The hearing officer's determinations in that regard are not so contrary to the great weight of the evidence as to compel their reversal on appeal. *Id.*

We likewise affirm the hearing officer's determination that the claimant did not have disability as a result of an injury sustained on _____. Because the claimant did not sustain a compensable injury, he could not have disability as a matter of law. Section 401.011(16).

The hearing officer's decision and order is affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Terri Kay Oliver
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge